

ORIGINAL  
RECEIVED

DOCKET FILE COPY ORIGINAL

JAN 26 1998

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Section )  
309(j) of the Communications )  
Act - Competitive Bidding )  
for Commercial Broadcast and )  
Instructional Television )  
Fixed Service Licenses )

MM Docket No. 97-234

To: The Commission

COMMENTS

COOK INLET REGION, INC.

Joe D. Edge  
Mark F. Dever

DRINKER BIDDLE & REATH LLP  
901 Fifteenth Street, N.W  
Suite 900  
Washington, DC 20005  
(202) 842-8800

Dated: January 26, 1998

No. of Copies rec'd  
List A B C D E

049

## TABLE OF CONTENTS

	Page
SUMMARY . . . . .	ii
I. INTRODUCTION . . . . .	1
II. PROVISIONS FOR SMALL AND MINORITY-OWNED BUSINESSES . . . . .	3
A. The Commission Should Adopt Market Effective Small Business Bidding Credits for any Broadcast Auctions . . . . .	6
B. The Commission Should Promote Small Business Participation Through its Various Broadcast Ownership Policies . . . . .	9
C. The Commission Should Complete a Telecommunications Discrimination Study in Support of Minority-Owned Business Provisions . . . . .	10
III. ATTRIBUTION AND AFFILIATION RULES . . . . .	15
A. The Commission's Attribution and Affiliation Rules Should Provide Certainty for Small Business Applicants . . . . .	15
B. The Commission Must Include Its Tribal Affiliation Exemption Among Any Small Business Provisions . . . . .	18
IV. CONCLUSION . . . . .	22

## SUMMARY

Cook Inlet Region, Inc. ("CIRI") urges the Commission to adopt competitive bidding measures designed to increase the participation of small and minority-owned businesses in the broadcast industry. CIRI agrees with the Commission's determinations that small business preference frequently also assist minority-owned businesses, for which reason the Commission should adopt market effective bidding credits for small businesses in its auction of broadcast spectrum.

CIRI also urges the Commission to explore ways to assist smaller businesses through its various broadcast ownership policies. For example, the Commission could develop an exception to its national television ownership limitation to permit an entity to exceed the 35 percent national aggregate audience cap if it partners with a small business. Alternatively, the Commission could waive its duopoly rule to authorize contour overlap with stations owned and controlled by small businesses. CIRI urges the Commission to consider these alternatives as a complement to any competitive bidding provisions adopted here.

Though small business preferences tend to help minority-owned businesses, it is also incumbent upon the Commission to fulfill its unchanged Section 309(j) mandate to assist minority-owned businesses directly. CIRI urges the Commission quickly to complete a study of discrimination and minority participation in the telecommunications industry as a means to develop race-based preferences. For example, statistical evidence already before

the Commission suggests a gross statistical disparity between national minority population figures and the number of minority-owned businesses working in the broadcast industry. Either through its Section 257 proceeding or through its participation in the Telecommunications Development Fund, the Commission should aggressively pursue the types of statistical evidence that will yield a sustainable minority preference policy.

Separately, CIRI urges the Commission to adopt attribution and affiliation rules for its broadcast auctions that provide certainty for smaller bidders. CIRI supports the use of a "controlling interest" threshold to determine whether an entity qualifies as a small business, but CIRI suggests that new market entrants will be better able to attract capital if the rights and limitations of business partners and non-controlling investors are clearly ascertainable. This applies to non-investment relationships — such as management agreements, brand name arrangements, and loan facilities — and to non-controlling investments — such as limited partnerships and memberships in limited liability companies. CIRI also urges the Commission to ensure that its tribal affiliation exemption applies to its broadcast auction rules, either through the newly-adopted Part 1 competitive bidding rules or through a service-specific affiliation definition.

In the Matter of )  
 )  
Implementation of Section ) MM Docket No. 97-234  
309(j) of the Communications )  
Act - Competitive Bidding )  
for Commercial Broadcast and )  
Instructional Television )  
Fixed Service Licenses )  
  
To: The Commission

Cook Inlet Region, Inc. ("CIRI"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, submits these Comments in response to the captioned Notice of Proposed Rulemaking ("NPRM"), adopted by the Commission on November 25, 1997, and released on November 26, 1997.

CIRI has long been an active supporter of responsibly managed government efforts to encourage small and minority-owned business participation in the communications industry. Since the advent of the Commission's spectrum auction proceedings, CIRI has been a strong proponent of what became the Commission's entrepreneurs' block rules. In Comments and Reply Comments<sup>1</sup> in PP Docket 93-253, for example, CIRI demonstrated that preferences to assist businesses owned by members of minority groups would survive the intermediate scrutiny analysis then called for under

<sup>1</sup> Comments of Cook Inlet Region, Inc., PP Docket No. 93-253 (submitted Nov. 10, 1993); Reply Comments of Cook Inlet Region, Inc., PP Docket No. 93-253 (submitted Nov. 30, 1993).

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564 (1990).<sup>2</sup> In a Written Statement to the Commission's personal communications service ("PCS") Task Force in April, 1994, CIRI demonstrated the need for preferential measures and submitted statistical data illustrating the lack of minority participation in the telecommunications industry.<sup>3</sup> Similarly, CIRI Senior Vice President Margaret Brown testified before the Subcommittee on Minority Enterprise, Finance and Urban Development in May, 1994, about the problems that plague Native Americans in particular and the need for preferential measures in the telecommunications industry for members of minority groups.<sup>4</sup> Most recently, CIRI urged the Commission to increase opportunities for responsible small bidders in the broadband PCS auctions, in the auctions of Wireless Communications Service ("WCS") and Local Multipoint

---

<sup>2</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Second Report and Order, 9 FCC Rcd 2348, 2398-2400 (1994) ("Second Report and Order") (citing CIRI constitutional analysis of minority preferences).

<sup>3</sup> Written Statement of Cook Inlet Region, Inc., GEN Docket 90-314 (submitted April 22, 1994) (with twelve attachments).

<sup>4</sup> Discrimination in the Telecommunications Industry: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103rd Cong., 2d Sess. 55-56 (1994) (statement of Margaret Brown, Senior Vice President, Cook Inlet Region, Inc.). Ms. Brown's testimony was filed with the Commission by Chairman Mfume on May 31, 1994 and was cited by the Commission in its Order on Reconsideration in PP Docket 93-253. See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 n.13 (1994) ("Broadband PCS Order on Reconsideration").

Distribution Service ("LMDS") spectrum, and as part of the Commission's Part 1 competitive bidding rules.

Against this background, CIRI urges the Commission to adopt competitive bidding measures designed to increase the participation of minority-owned and small businesses in the broadcast industry. Although Congress has directed the Commission to relax national and local broadcast ownership limitations, Congress also has left in place its Section 309(j) directives to foster the participation of small businesses and businesses owned by members of minority groups in the telecommunications industry. The Commission can satisfy both of these mandates by relying on proven spectrum auction small business policies and by aggressively pursuing statistical evidence to support minority business preferences. CIRI also urges the Commission to provide certainty for smaller bidders in its broadcast competitive bidding attribution and affiliation rules and to see that its tribal affiliation exemption is included in the broadcast auction provisions.

## **II. PROVISIONS FOR SMALL AND MINORITY-OWNED BUSINESSES**

Perhaps the most important issue facing the Commission in this proceeding is the appallingly low participation of minority-owned businesses in the broadcast industry. Broadcast radio and television is by far the most influential communications medium, yet the Commission itself notes that "minority ownership of broadcast stations has recently declined from 3.07 percent in

1995 to 2.81 percent in 1996-97."<sup>5</sup> Moreover, this trend is likely to continue. Industry consolidation such as that underway in the broadcast field<sup>6</sup> typically means fewer opportunities for minority-owned businesses. Commission intervention in the competitive bidding context — and otherwise — may help to create opportunities where few will develop in the current environment.

As the Commission undertakes to address this problem in the context of its various broadcast ownership and competitive bidding proceedings, CIRI urges the Commission to consider the policies articulated by Congress in Section 309(j) of the Communications Act. Specifically, Section 309(j)(3)(B) directs the Commission to pursue the following objectives:

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.<sup>7</sup>

Further, Section 309(j)(4)(D) provides that the Commission's regulations must:

(D) ensure that small businesses, rural telephone companies, and businesses owned by members of minority

---

<sup>5</sup> NPRM at ¶ 86 (footnote omitted).

<sup>6</sup> See, e.g., Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, FCC 97-164, ¶ 192 ("Commenters are correct in pointing out that there has been greater consolidation of radio ownership since the relaxation of the Commission's broadcast radio ownership rules") ("Section 257 Report").

<sup>7</sup> 47 U.S.C. § 309(j)(3)(B) (emphasis added).

groups and women are given the opportunity to participate in the provision of spectrum-based services . . . .<sup>8</sup>

Significantly, Congress amended neither of these sections in the Telecommunications Act of 1996 or the Balanced Budget Act of 1997.<sup>9</sup> Thus, despite the opportunity to redirect the Commission's spectrum licensing policies with regard to minority-owned businesses, Congress chose to stay the course.

That Congress retained this explicit Section 309(j) mandate at the very same time that it directed the Commission to relax broadcast ownership limitations<sup>10</sup> suggests that Congress intended the Commission to be proactive in furthering the Section 309(j) policies. To promote broadcast ownership diversity while administering the congressional mandate to relax ownership limitations, CIRI urges the Commission to look to its existing spectrum auction designated entity programs. The Commission's efforts on behalf of small businesses in the competitive bidding context have been steadily refined over the course of four years, and they are a sound platform from which to begin to address minority ownership issues in the broadcast industry.

In that regard, CIRI agrees with the Commission's determinations that its small business preferences also frequently aid minority-owned businesses without raising

---

<sup>8</sup> 47 U.S.C. § 309(j)(4)(D) (emphasis added).

<sup>9</sup> Cf. Self-Employed Health Insurance Act of 1995, Pub. L. No. 104-7, § 2, 109 Stat. 93 (1995) (eliminating the minority tax certificate program).

<sup>10</sup> See Section 257 Report at ¶ 192.

substantial constitutional implications. While CIRI urges the Commission to develop these small business policies as a proxy for provisions directly benefiting minority-owned businesses, the Commission must undertake seriously to develop a record on which to base a minority preference plan. Thus, CIRI proposes here certain measures that the Commission may develop immediately to benefit small businesses entering the broadcast industry, in addition to which CIRI urges the Commission vigorously to pursue statistical evidence that may support preferences for minority-owned businesses in the same field.

**A.    The Commission Should Adopt Market Effective Small Business Bidding Credits for any Broadcast Auctions**

At the center of the Commission's spectrum auction small business policies are bidding credits used to reduce the amounts owed to the federal government after the close of the auction. As the Commission has found on many occasions, providing a means to lower the cost of a winning bid frequently helps smaller businesses to attract the capital necessary to participate in the Commission's spectrum auction. Moreover, bidding credits are particularly important if the Commission does not offer installment payment plans to smaller businesses. In its LMDS proceeding, the Commission determined that "heightened bidding credits are appropriate in the absence of installment payment

plans,"<sup>11</sup> and in its Part 1 Third Report and Order,<sup>12</sup> the Commission wrote:

We believe that without installment payments, bidding credits, coupled with providing bidders sufficient time to raise financing, will enable small businesses to successfully compete in future auctions.<sup>13</sup>

In this case, the Commission should adopt market-effective bidding credits that will benefit small businesses in the Commission's broadcast auctions.

In this regard, CIRI urges the Commission to develop tiered bidding credits<sup>14</sup> that will afford smaller entities a greater

---

<sup>11</sup> Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 -29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Second Order on Reconsideration, FCC 97-323, ¶ 19 (rel. Sept. 12, 1997).

<sup>12</sup> Amendment of Part 1 of the Commission's Rules - Competitive Bidding Procedures, Third Report and Order, FCC 97-413, ¶ 46 (rel. Dec. 31, 1997) ("Part 1 Third Report and Order").

<sup>13</sup> Id. at ¶ 34. In its Part 1 Notice of Proposed Rule Making, the Commission wrote:

We note that substituting a system of larger bidding credits might eliminate the administrative and market concerns associated with installment payments, while nonetheless ensuring opportunities for small businesses to participate in auctions.

Amendment of Part 1 of the Commission's Rules - Competitive Bidding Proceeding, Order, Memorandum Opinion and Order and Notice of Proposed Rule Making, FCC 97-60, ¶ 34 (rel. Feb. 28, 1997).

<sup>14</sup> To the extent that the Commission adopts preferences for minority-owned businesses as well, these bidding credits should be cumulative to account for the unique obstacles facing smaller businesses that are also owned by members of minority groups. NPRM at ¶ 93. The Commission's original broadband PCS competitive bidding rules included such a tiered, cumulative approach.

opportunity to compete for broadcast licenses. As the Commission notes, many applicants for broadcast services tend to be smaller businesses,<sup>15</sup> for which reason bidding credits that distinguish among smaller businesses with some precision are critical. Thus, CIRI urges the Commission to employ the bidding credits established as part of its newly-adopted Part 1, Subpart Q competitive bidding rules.<sup>16</sup> The new Part 1 bidding credits include tiered preferences for businesses with average annual gross revenues of \$3 million, \$15 million, and \$40 million, which will account for differences among the various smaller businesses applying for broadcast spectrum. Higher bidding credit thresholds might operate to exclude very small businesses from the process.

CIRI also supports the Commission's proposal to use bidding credits to promote diversification of ownership in the broadcast industry.<sup>17</sup> Given the broadcast industry consolidation addressed above, it is plain that the Commission's multiple ownership rules — as amended — are not sufficient to foster diversification.<sup>18</sup> In conjunction with changes to broadcast ownership limits proposed below, CIRI urges the Commission to offer enhanced bidding credits linked to the extent and location of an applicant's other broadcast industry holdings. A 10 percent

---

<sup>15</sup> NPRM at ¶ 85.

<sup>16</sup> See id. at ¶ 51. See also 47 C.F.R. § 1.2110(e).

<sup>17</sup> NPRM at ¶ 92.

<sup>18</sup> Id.

bidding credit addition could be made available to smaller businesses with no attributable broadcast ownership interests in the relevant service area, and a 5 percent addition could be made available to smaller businesses with one attributable ownership interest in the relevant service area. No bidding credit additions should be available to entities with more than one attributable broadcast ownership interest in the area.

**B.   The Commission Should Promote Small Business Participation Through its Various Broadcast Ownership Policies**

---

In addition to promoting the diversity of broadcast ownership through competitive bidding provisions,<sup>19</sup> CIRI urges the Commission to consider ways to promote small business participation through its various broadcast ownership policies. As part of its efforts to recraft its national television ownership rules, for example, the Commission could provide an option for existing television station owners to exceed the aggregate national audience cap of 35 percent by partnering with small businesses. Under such a policy, existing owners could hold cognizable interests in stations reaching up to 40 percent of the aggregate national audience if the stations accounting for the audience reach in excess of 35 percent are owned and controlled by small businesses. Higher or lower audience reach percentage points could be authorized based on the size and minority group status of the small business participants.

---

<sup>19</sup> Id.

Similarly, the Commission could amend its local television duopoly rule to permit contour overlap where the additional stations are owned and controlled by small businesses. In particular, expansion credits could be developed to allow overlap of VHF signals, VHF-UHF signals, or UHF signals, depending upon the size of the small business controlling entity and the size and number of competing television stations. Alternatively, the Commission could amend its multiple ownership policies to exclude from the definition of cognizable interest various local marketing agreements or investment interests held in or by smaller business ventures. In whatever fashion, CIRI urges the Commission to promote the diversification of broadcast ownership under its current multiple ownership rules separately from its efforts to craft effective small business competitive bidding provisions.

**C. The Commission Should Complete a Telecommunications Discrimination Study in Support of Minority-Owned Business Provisions**

Finally, to develop minority-owned business auction provisions consistent with the standards set forth in the Supreme Court's 1995 decision in Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097,<sup>20</sup> CIRI urges the Commission promptly to complete a study of discrimination against minorities in the broadcast industry specifically and in telecommunications generally.<sup>21</sup> In

---

<sup>20</sup> Id. at ¶ 87.

<sup>21</sup> Though the Commission indicates in the NPRM that it has "commenced a comprehensive study," id. at ¶ 91, the Commission indicated just four weeks ago that it is "planning to undertake a

addition to any study undertaken by the Commission as part of its Section 257 proceeding,<sup>22</sup> the Commission representative to the Telecommunications Development Fund ("TDF") should propose using TDF funds to commission a study on the sources and effects of racial discrimination in the telecommunications industry. The Commission has identified the need for a record of discrimination in the industry to satisfy the heightened scrutiny applied by the Supreme Court in Adarand,<sup>23</sup> and Congress authorized the TDF specifically to use its funds for "the preparation of research, studies, or financial analyses."<sup>24</sup> The Commission's future efforts to develop and maintain minority preference rules will be buttressed with the record evidence from such an examination.

With regard to the study, it is well-established that a governmental actor may rely on statistical evidence that discrimination in a particular industry has occurred to show a compelling governmental interest that justifies taking race into account.<sup>25</sup> As the Supreme Court wrote in applying strict scrutiny in City of Richmond v. J.A. Croson Co., 488 U.S. 469

---

study." Part 1 Third Report and Order at ¶ 15 n.36.

<sup>22</sup> Section 257 Report at ¶ 223.

<sup>23</sup> NPRM at ¶ 87.

<sup>24</sup> 47 U.S.C. § 614(e)(4).

<sup>25</sup> As the Commission notes, less than 3 percent of the total numbers of commercial television and radio stations in the United States are held by members of minority groups, NPRM at ¶ 86, while their total representation in the United States population is roughly 28 percent. This discrepancy obviously is not a mere statistical anomaly.

(1989), "There is no doubt that where gross statistical disparities can be shown, they alone in the proper case may constitute prima facie proof of a pattern or practice of discrimination."<sup>26</sup> The Court also indicated that "evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a . . . government's determination that broader remedial relief is justified."<sup>27</sup>

Acting under the broad authority delegated by Congress, the Commission has adduced additional evidence of minority underrepresentation in the communications field. For example, on the record in PP Docket 93-253 is the Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket 90-314 (Sept. 15, 1993) ("SBAC Report").<sup>28</sup> The SBAC Report noted that a 1991 study by the United States Department of Commerce found that minority-owned

---

<sup>26</sup> Croson, 488 U.S. at 501 (quoting Hazelwood School District v. United States, 433 U.S. 299, 307-08 (1977) (internal quotation marks omitted). The Court added, however, that comparisons to the general population may be unhelpful where special qualifications are required for the jobs at issue. Croson, 488 U.S. at 501.

<sup>27</sup> Id. at 509. Lower courts have followed suit. See Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1555 (11th Cir. 1994) ("Evidence that the statistical imbalance between minorities and non-minorities in the relevant work force and available labor pool constitutes a gross disparity, and thus a prima facie case of a constitutional or statutory violation, may justify a public employer's adoption of racial or gender preferences"); Coral Construction Co. v. King Cy., 941 F.2d 910, 920-21 (9th Cir. 1991), cert. denied, 502 U.S. 1033 (1992).

<sup>28</sup> See Second Report and Order, 9 FCC Rcd at 2388, 2399.

firms represented only 0.5 percent of all firms in the Federal radiotelephone industry classification.<sup>29</sup> In turn, the 1991 Department of Commerce Study indicated that only one cellular service operator in the nation was found to be a minority business enterprise and only eleven minority firms provided cellular equipment.<sup>30</sup>

In addition, a 1995 National Telecommunications and Information Administration ("NTIA") Paper on minority ownership in the telecommunications industries<sup>31</sup> details that minorities comprise approximately 25 percent of the United States population, but that minority-owned firms represent only 9 percent of United States businesses generally.<sup>32</sup> The 1995 NTIA Paper further suggests that of the total \$556.1 billion in revenue generated by the telecommunications and information industries in 1993, the largest black-owned firms might have contributed as little as \$1.36 billion — or .24 percent.<sup>33</sup>

---

<sup>29</sup> SBAC Report at 4.

<sup>30</sup> Minority Business Development Agency, United States Department of Commerce, A Market Analysis of the Telecommunications Industry - Opportunities for Minority Businesses 1 (Aug. 20, 1991).

<sup>31</sup> National Telecommunications & Information Administration, United States Department of Commerce, Capital Formation and Investment in Minority Business Enterprises in the Telecommunications Industries (April 1995) ("1995 NTIA Paper").

<sup>32</sup> Id. at 6.

<sup>33</sup> Id. at 4, 8 (compare Table 2 with Table 4). Although the breadth of the industry group discussed in Table 4 is not clear, a comparison of Table 2 with Table 4 suggests a gross disparity in telecommunications revenues generally and those generated by black-owned firms.

Similarly, in the Fifth Report and Order the Commission described how "minorities have not gained substantial ownership representation in either the broadcast or nonbroadcast telecommunications industries."<sup>34</sup> In support, the Commission noted, among other things, that just 2.7 percent of the nation's commercial broadcast stations were owned by minorities in 1993.<sup>35</sup> In the NPRM in this proceeding, the Commission notes that "minority ownership of broadcast stations has recently declined from 3.07 percent in 1995 to 2.81 percent in 1996-97."<sup>36</sup> CIRI also has provided the Commission with materials demonstrating the substantial underrepresentation in the communications industry of minorities in general and of Native Americans in particular.<sup>37</sup>

At bottom, the data already before the Commission suggests a gross statistical disparity in the number of businesses owned by members of minority groups in the broadcast industry and the number available to do the work. This statistical disparity certainly could serve as the foundation for a discrimination study by the TDF. CIRI urges the Commission and the TDF to promptly to complete such a study, and to use the results in support of competitive bidding preferences for minority-owned

---

<sup>34</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5577 (1994) ("Fifth Report and Order").

<sup>35</sup> Id.

<sup>36</sup> NPRM at ¶ 86 (footnote omitted).

<sup>37</sup> See CIRI PCS Task Force Statement at 4-8; Brown Testimony at 4-7.

businesses. While small business preferences are useful proxies for efforts to assist minority-owned businesses, Section 309(j) requires the Commission to find ways to remedy the lack of minority participation in the provision of spectrum-based services. The level of minority participation in the broadcast industry is rapidly declining, and the Commission should work quickly to develop the record needed to stop that trend.

### **III. ATTRIBUTION AND AFFILIATION RULES**

#### **A. The Commission's Attribution and Affiliation Rules Should Provide Certainty for Small Business Applicants**

At the core of the Commission's small business auction policy is the effort to increase opportunities for small businesses to attract the capital necessary to compete against more entrenched companies. To that end, the Commission developed its broadband PCS control group structures to permit a small business to attract capital without turning control of the auction applicant to nonqualifying entities. The Commission identified certain required levels of ownership and control by small businesses — and permissive levels of ownership by others — and effectively established a safe-harbor for small business auction participation.

An important byproduct of this control group structure was certainty. As the Commission wrote in 1994:

In adopting these affiliation rules, we emphasize that these rules will not be applied in a manner that defeats the objectives of our attribution rules. . . . [S]o long as the requirements of our attribution rules are met, the affiliation rules will not be used to defeat the underlying policy objectives of allowing such passive investors. More specifically, if a control group has de

facto and de jure control of the applicant, we shall not construe the affiliation rules in a manner that causes the interests of passive investors to be attributed to the applicant.<sup>38</sup>

The Commission later articulated certain guidelines for identifying de facto control of an applicant by a control group.<sup>39</sup>

In this case, CIRC supports the Commission's use of a "controlling interest" threshold to determine whether an entity qualifies to bid as a small or minority-owned business,<sup>40</sup> but CIRC urges the Commission to do so in a way that provides continued certainty for potential small bidders. First, the Commission should further clarify the types of small business-investor relationships that would be permitted in a more general attribution scheme. This is particularly important where small

---

<sup>38</sup> Fifth Report and Order, 9 FCC Rcd at 5620.

<sup>39</sup> Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 447 (1994) ("Fifth MO&O").

<sup>40</sup> NPRM at ¶ 88. In this regard, Commission should treat minority-owned businesses in the same fashion as small businesses in its competitive bidding rules. Where a small business owner must satisfy a "controlling interest" standard to confirm the revenue-based eligibility of the applicant, minority-owned firms should not be held to a higher standard, such as one that requires 50.1 percent voting and 50.1 percent equity ownership. See id. at ¶ 89. The Commission has noted on many occasions that its small business preferences also frequently aid minority and women-owned businesses, suggesting that the barriers to entry to be overcome by these entities are similar. See Section 257 Report at ¶ 215 ("As was the case for small businesses, the predominant impediment to entry identified [for minority-owned businesses] is access to and cost of capital"). Holding minority business principals to a higher equity ownership requirement than small business principals is inconsistent with this determination.

businesses might consider entering into management agreements, brand-name arrangements, loan facilities, or other relationships with current or potential investors.<sup>41</sup> A more relaxed attribution regime might have the effect of driving potential investors away if the requirements of the law are not readily-discernable.

Second, CIRI urges the Commission to clarify the effect of recognized provisions benefitting non-controlling investors in the small business de jure and de facto control standard.<sup>42</sup> In a 1985 broadcast order, the Commission wrote:

While the [Revised Uniform Limited Partnership Act] specifies that a limited partner can participate in any of the 'safe harbor' activities enumerated in that model statute without being deemed to have taken part in the 'control' of the business, it is clear that exercise of many of these activities could involve the limited partner in the affairs of the partnership to a far greater degree than is appropriate for one who has been granted a total exemption from attribution on the basis of the 'passive' nature of his or her equity holdings.<sup>43</sup>

Yet, in the broadband PCS context, the Commission indicated that "certain provisions benefitting non-majority investors" might be found to deprive the control group of de facto control, "particularly if the terms of such provisions vary from

---

<sup>41</sup> NPRM at ¶ 89.

<sup>42</sup> Id.

<sup>43</sup> Corporate Ownership Reporting and Disclosure of Broadcast Licenses, FCC 85-252, 58 RR2d (P & F) 604, 616 (1985) (footnote omitted).

recognized standards."<sup>44</sup> The Commission cited the Uniform Limited Partnership Act as one such recognized standard.<sup>45</sup>

Given the widespread use of limited partnerships and limited liability companies in the spectrum auction context, smaller bidders will be better able to attract the capital necessary to participate in these auctions if the permissible activities of non-controlling investors are known or knowable. This is particularly important with regard to investor protection terms that permit non-controlling partners or company members to vote on certain extraordinary business actions. The identification by the Commission of permissible activities or of a uniform standard to which these relationships may be compared will assist small business principals to retain de jure and de facto control of auction applicants and licensees.

**B. The Commission Must Include Its Tribal Affiliation Exemption Among Any Small Business Provisions**

If the Commission employs its newly-adopted Part 1, Subpart Q competitive bidding rules in this context,<sup>46</sup> the Commission will be able to apply its tribal affiliation exemption<sup>47</sup> to any small business rules that are developed here. If the Commission does not employ the Part 1 rules, however, CIRI urges the

---

<sup>44</sup> Fifth MO&O, 10 FCC Rcd at 449 (footnote omitted).

<sup>45</sup> Id. at 449 n.190.

<sup>46</sup> NPRM at ¶ 51.

<sup>47</sup> See 47 C.F.R. § 1.2110(b)(4)(xi).

Commission to include its tribal affiliation exemption in its small business rules for broadcast license competitive bidding.

The tribal affiliation exemption established by the Commission for broadband PCS,<sup>48</sup> WCS,<sup>49</sup> LMDS,<sup>50</sup> and the Part 1 auction rules<sup>51</sup> is an important part of the Commission's small business auction policy. The Commission developed the tribal affiliation exemption to ensure that its small business rules are consistent with those of the Small Business Administration ("SBA"). Specifically, federal law directs the SBA to calculate the "size" of any entities owned by an Indian tribe "without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe . . . ." <sup>52</sup> Pursuant to the direction of Congress, the SBA's Rules provide that, for size determination purposes, "concerns owned and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601) . . . are not considered affiliates of such entities, or with other concerns owned by these entities solely because of their common ownership."<sup>53</sup> The

---

<sup>48</sup> 47 C.F.R. § 24.720(l)(11)(i).

<sup>49</sup> 47 C.F.R. § 27.210(b)(3)(ii).

<sup>50</sup> 47 C.F.R. § 101.1112(h)(11).

<sup>51</sup> 47 C.F.R. § 1.2110(b)(4)(xi).

<sup>52</sup> 15 U.S.C. § 636(j)(10)(J)(ii)(II).

<sup>53</sup> 13 C.F.R. § 121.103(b)(2) (1996).

same exemption is included in the SBA's size standard guidelines for its 8(a) Program.<sup>54</sup>

As part of its detailed use of these SBA standards in the broadband PCS context, the Commission adopted its tribal affiliation exemption in 1994 to "mirror[] this congressional mandate."<sup>55</sup> Since then, the Commission consistently has reaffirmed the tribal affiliation exemption. In particular, the Commission made clear that its tribal affiliation exemption is unaffected by the Supreme Court's decision in Adarand, reaffirming the exemption five times since the Court's 1995 ruling.<sup>56</sup> In 1996, the SBA also completed a comprehensive, post-Adarand overhaul of its small business affiliation rules in which it retained the tribal affiliation exemption on which the Commission's rule is based.<sup>57</sup> Against this background, the Commission's broadcast auction small business preference program

---

<sup>54</sup> 13 C.F.R. § 124.112(c)(2)(iii) (1996).

<sup>55</sup> Fifth MO&O, 10 FCC Rcd at 428.

<sup>56</sup> See Part 1 Third Report and Order at ¶ 28; Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5 -29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, Order on Reconsideration, 12 FCC Rcd 6424, 6429-30 (1997); Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service, Report and Order, 12 FCC Rcd 10785, ¶ 195 (1997); Amendment of Parts 20 and 24 of the Commission's Rules - Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, 11 FCC Rcd 7824, 7842 (1996); Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, 11 FCC Rcd 136, 155-56 (1995).

<sup>57</sup> See 61 Fed. Reg. 3280, 3287 (1996).

must include the tribal affiliation exemption featured in the Commission's other competitive bidding rules.<sup>58</sup>

---

<sup>58</sup> Plainly, the same interests that justified the Commission's action in 1994 — and again in 1995, 1996, and 1997 — apply with equal force in this context. Pursuant to Section 309(j) of the Communications Act, the Commission continues to refine a system of competitive bidding to disseminate licenses among a wide variety of applicants, including — at a minimum — small businesses. Recognizing that the tribal affiliation exemption is an important part of the SBA's small business rules, the Commission developed and applied its tribal affiliation rule to be consistent with "these other Federal policies and . . . the congressional mandate in the auction law." Broadband PCS Order on Reconsideration, 9 FCC Rcd at 4494 (footnotes omitted). Nothing in the record since that determination has affected the validity of the Commission's judgment, and there is no cause for the Commission to depart from that judgment here.